

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs.

ABRAHAM SPOTTED ELK,

Defendant/Movant.

Cause No. CR 86-18-BLG-SPW
CV 21-31-BLG-SPW

ORDER DISMISSING MOTION
AND DENYING CERTIFICATE OF
APPEALABILITY

On March 23, 2021, Defendant/Movant Spotted Elk filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Spotted Elk is a federal prisoner proceeding pro se.

Spotted Elk filed motions under 28 U.S.C. § 2255 on November 1, 1993, August 26, 2004, and April 6, 2018. The first was denied. Spotted Elk did not appeal. Spotted Elk moved to dismiss the second. *See* Docket (Doc. 1) Nos. 95, 96, 100, 102, 104, 105. On March 17, 2008, Spotted Elk filed a third § 2255 motion (Doc. 2). It was dismissed and a certificate of appealability was denied on April 14, 2008. *See* Order (Doc. 4). The fourth was filed on April 6, 2018 (Doc. 8). It was dismissed and a certificate of appealability was denied on April 10, 2018. *See* Order (Doc. 11). On September 26, 2018, the Ninth Circuit Court of Appeals denied a certificate of appealability. *See* 9th Cir. Order (Doc. 14).

Spotted Elk now raises issues concerning the definition of a “crime of violence” as it applied in his case. He refers to *Johnson v. United States*, 576 U.S. 591 (2015), and categorical analysis. *See* Mot. § 2255 (Doc. 15) at 4–5.

As Spotted Elk knows, *see* Order (Doc. 11) at 1–2, this Court cannot entertain a second or successive motion under 28 U.S.C. § 2255 unless and until the Court of Appeals authorizes him to file such a motion in this Court. *See* 28 U.S.C. §§ 2255(h), 2244(c).

A petition under 28 U.S.C. § 2241 is available in a narrow range of cases, *see, e.g., Allen v. Ives*, 950 F.3d 1184, 1188–91 (9th Cir. 2020), but not here. Spotted Elk was convicted and sentenced for second degree murder, a violation of 18 U.S.C. § 1111. *See* Judgment (Doc. 7) at 1; *see also* Indictment (Doc. 5) at 1. The definition of the phrase “crime of violence” played no role in his case.

A certificate of appealability is denied because the case is clearly controlled by *Burton*. *See Gonzalez v. Thaler*, 565 U.S. 134, 140–41 (2012) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).


Accordingly, IT IS ORDERED:

1. Spotted Elk’s § 2255 motion (Doc. 15) is DISMISSED for lack of jurisdiction.

2. A certificate of appealability is DENIED. The Clerk of Court shall immediately process the appeal if Spotted Elk files a Notice of Appeal.

3. The Clerk of Court shall ensure that all pending motions in this case and in CV 21-31-BLG-SPW are terminated and shall close the civil file by entering a judgment of dismissal.

DATED this 30th day of March, 2021.



Susan P. Watters
United States District Court